

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application of)
)
EchoStar Communications Corporation,)
(a Nevada Corporation), General Motors)
Corporation, and Hughes Electronics)
Corporation (Delaware Corporations))
)
(Transferors))
)
and)
)
EchoStar Communications Corporation)
(a Delaware Corporation))
)
(Transferee))

CS Docket No. 01-348

To: Chief Administrative Law Judge
Richard L. Sippel

**OPPOSITION TO REQUEST TO CERTIFY QUESTION AS TO WHETHER
HEARING SHOULD BE HELD AND REQUEST FOR EMERGENCY
PREHEARING CONFERENCE**

Johnson Broadcasting, Inc. and Johnson Broadcasting of Dallas, Inc. (collectively
“Johnson Broadcasting”), parties in the above-captioned proceeding, by their attorney,
hereby file their Opposition to the joint “Request to Certify Question As to Whether
Hearing should be Held” filed by General Motors Corporation and Hughes Electronics
Corporation (herein referred to as “DirecTV”) and EchoStar Communications
Corporation (“EchoStar”). In addition, and for the reasons set forth herein, Johnson

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Broadcasting requests that the Presiding Judge schedule an emergency prehearing conference as expeditiously as possible.

In their “Request to Certify Question” DirecTV and EchoStar make two primary arguments. First, DirecTV and EchoStar claim that the Commission “erred in completely disregarding the broadband benefits to flow from the EchoStar/Hughes merger,”¹ while apparently crediting such broadband benefits in the AT&T/Comcast merger.² Based on this thin thread of reasoning, DirecTV and EchoStar request the Presiding Judge to certify to the Commission whether a hearing should be held. DirecTV and EchoStar’s second argument is that there is a need for expedited consideration, because their Plan of Merger calls for an FCC decision by January 6, 2003.

Comparing the AT&T/Comcast merger with the EchoStar/DirecTV proposed merger is like comparing apples and oranges. The AT&T/Comcast application proposed a merger of cable system operators, while EchoStar/DirecTV’s application proposes a merger of direct broadcast satellite (“DBS”) providers. There are significant legal, technical and economic distinctions between cable systems and DBS providers.

The coverage area of cable systems do not overlap and therefore they are not generally considered competitors. Prior to announcing the proposed merger EchoStar and DirecTV were fierce competitors. EchoStar and DirecTV are the two major DBS carriers in the United States. As a combined entity, they would have overwhelming control of the DBS market. Johnson Broadcasting has argued, and the Commission has agreed, that allowing DirecTV and EchoStar to merge would lead to anti-competitive

¹ See, Request to Certify Question, Summary, p. i.

² *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70, FCC 02-310 (released November 14, 2002).

abuses and would lessen competition.³ Furthermore, actions by DirecTV and EchoStar demonstrate that the merger would not be in the public interest. The evidence indicates that DirecTV and EchoStar would continue to undermine the ability of local television broadcast stations to serve the public by denying or marginalizing their ability to participate in the carriage of their television signals, as required under Section 338 of the Communications Act and Section 76.66 of the Commission's Rules. AT&T/Comcast, on the other hand, do not have a history of wrongfully denying carriage to television stations in their coverage areas.

While setting forth the differences between cable system operators and DBS providers goes beyond the scope of this pleading, one key example can be provided. Johnson Broadcasting has must carry rights on cable systems that are significantly different from its must carry rights on satellite.⁴ Johnson Broadcasting has a right to have its television stations carried on every cable system in its stations' DMAs. On the other hand, Johnson Broadcasting has been denied its must carry rights on both the DirecTV and EchoStar systems. Initially, EchoStar had agreed to carry Johnson Broadcasting's stations but just 5 days after the EchoStar/DirecTV merger was announced, EchoStar notified Johnson Broadcasting that it would not carry its stations.

As DirecTV and EchoStar admit in their Request to Certify Question, the FCC considered their broadband arguments and found that they were not sufficient to overcome the anticompetitive issues as well as other public interest issues raised in the *HDO*. To revisit issues that the Commission has already considered serves no purpose

³ See, *Hearing Designation Order*, ("HDO") CS Docket No. 01-348, released October 18, 2002.

⁴ Compare 41 C.F.R. §76.56 and 41 C.F.R. §76.66.

and would waste time, when DirecTV and EchoStar claim that they are running out of time to complete their proposed merger.

DirecTV and EchoStar's second point, that they must complete the merger before January 6, 2003, is disingenuous and lacks candor. January 6, 2003 is an artificial deadline, which can be changed at anytime by the mutual agreement of DirecTV and EchoStar. Rather than accommodate the Commission, DirecTV and EchoStar expect the Commission to accommodate them. They expect the Presiding Judge to become fully versed with the 299 paragraphs of the *HDO* and the 233 paragraphs of the *AT&T/Comcast* merger order. He is then expected to compare the two documents and issue an order, well in advance of the artificial deadline of January 6, 2003.

As DirecTV and EchoStar state, they are in the process of preparing an amendment to their proposed merger application and a petition to suspend the hearing pending review of the amended application. If DirecTV and EchoStar were as concerned about time constraints as they claim to be, they would not seek to suspend the hearing. The *HDO* does not require the suspension of the hearing. While the Commission is considering DirecTV and EchoStar's amendment, the parties to this proceeding could be completing document production and scheduling depositions. Should the Commission fail to act on the amended application, rather than yet again asking the Commission to consider what it has already rejected, the parties could be well on their way to completing the discovery phase of this proceeding.

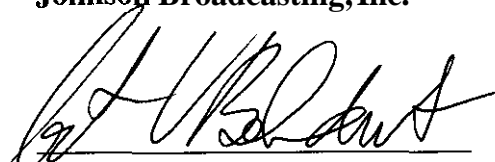
Johnson Broadcasting hereby requests that the Presiding Judge schedule a prehearing conference as soon as possible. The purpose of this conference would be to determine whether DirecTV and EchoStar wish to participate in a hearing before the

FCC. As set forth herein, January 6, 2003 is just an impossibly short period in which to complete discovery, conduct a hearing, draft proposed finding of facts and conclusions of law and allow for the Presiding Judge to issue an Initial Decision. If DirecTV and EchoStar are serious about participating in a hearing and if time is of the essence as they claim, then the parties should agree on a time for discovery and set a date for hearing. Such a course would expedite the hearing process without denying Johnson Broadcasting its due process rights.

Respectfully submitted,

Johnson Broadcasting, Inc.

By:

A handwritten signature in black ink, appearing to read 'A. V. Belendiuk', written over a horizontal line.

Arthur V. Belendiuk
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November 26, 2002

CERTIFICATE OF SERVICE

I, Sherry Schunemann, in the law offices of Smithwick & Belendiuk, P.C., hereby certify that a copy of the foregoing “Opposition to Request to Certify Question as to Whether Hearing Should be Held and Request for Emergency Prehearing Conference” was mailed by First Class U.S. Mail, postage prepaid (or hand delivered as denoted by an asterisk), this 26th day of November, 2002, to the following:

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